No. 3635

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

T. M. Anderson,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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The point upon which the defendant relies chiefly for a reversal of the judgment herein is this: That throughout this case testimony has been dragged in over defendant's objection as to the quality of the land, that is, as to whether the land was suitable for cultivation and as to whether water might be developed on it in sufficient quantities for irrigation. Evidence produced by the plaintiff showed that the greater portion of the land was hill and rock, and that water *might* be found along the eastern *line* of the land, upon the level portion thereof, in sufficient quantities for irrigation.

Defendant's contention is that it was this evidence as to the unsuitability of the land for agricultural purposes that resulted in the conviction.

The truth of the matter may have been, and very probably was, that the entryman Rood desired to enter the land and prove up on it, because of his belief that it was oil-bearing land.

Or it may have been that he believed the hills there contained certain minerals and for that reason he desired the land. Or perhaps he desired it for a quarry to produce certain rock found thereon to be used in connection with highway construction in that or nearby parts of the county.

The motives of Rood in entering the land were things that no skill or amount of cross-examination could have dragged from him. Rood, by showing that for the most part the land was unsuitable for agricultural purposes, thus led the jury to believe that it was for agricultural purposes that he had entered it, and therefore the jury was led to believe that the defendant Anderson had therein deceived him and had thereby transgressed the law. It was objected by the defendant throughout the case, as is shown by the bill of exceptions and the specifications of error, that the quality of the soil, and its suitability for agricultural purposes, was not an issue in the case. It is true enough that the court did instruct the jury that the statute does not make it a crime to misrepresent the character of the soil. But the jury, very likely on the theory of *"falsus in uno, falsus in omnibus,"* believed that, since the defendant had misrepresented the adaptability of the soil for agricultural purposes, most likely

he had misrepresented the surveyed description of the land.

Our contention is, as stated before, that Rood's motives for desiring to locate a certain piece of land are something that no cross-examination can elicit, unless Rood should so choose. The mere fact that the greater portion of the land was unsuitable for agricultural purposes does not show or prove that Rood did not enter the land for an entirely different purpose.

Throughout the case it was defendant's contention that quality of the soil was immaterial. Yet the testimony was permitted despite this objection. In the instructions requested by defendant it was sought to show that, no matter what was the quality of the soil, or no matter what had been the representations of the defendant concerning it, the real issue was this: Was Rood actually shown the land upon which the defendant filed him?

The defendant sought to overcome the prejudice done him in admitting this testimony by requesting defendant's instructions Nos. 2, 6 and 8, all of which were refused by the court. The refusal of the court to give these instructions is set out in sections V, VI and VII of the assignment of errors. [Transcript of Record, p. 60.]

We believe the defendant was entitled to these instructions. And we do not believe that the instruction given by the court, although it very nearly substantially covered the substance of these requested instruc-

tions, was sufficient to protect the rights of the defendant. We think that the court's instruction was not clear, that is, the law of the case was smothered in too many words. If the defendant was entitled to these instructions at all he was entitled to them in succinct, clear-cut instructions that "hit the nail on the head."

It is true enough that the court is not bound to give the instructions in exactly the form requested by the defendant, and that it is sufficient if they are given substantially. But in this case the question covered by the instructions requested by the plaintiff was the bone of contention throughout the case—and is not practically the only question to be considered on this appeal.

Defendant's complaint now would not be so bitter if proper instructions had not been submitted and requested by him. But the fact is that they *were* submitted. And that they *were* proper hardly admits of argument. And the fact that they were not given is what hurts.

An attorney studies his case for weeks in advance of the trial. The trial judge rarely has opportunity to examine a case—seldom studies it except during the course of the trial. When an attorney prepares an instruction he does so only after careful thought and with painstaking care as to the proper wording needed to convey the exact meaning intended. It is very seldom that a judge can deliver *extempore* to the

jury, and without reference to notes, an instruction that will cover the points of law as ably as will an instruction prepared by the attorney, assuming, of course, that the instruction so prepared is a proper one.

We believe that, if the jury had been instructed briefly and succinctly, exactly upon the point of law involved, the verdict would have been a different one. We believe that the defendant was prejudiced by the discussion given in the court's instruction, which although not faulty in substance perhaps, still did not "hit the nail on the head." The instructions prepared by defendant were brief, yet full; carefully worded, but nevertheless absolutely fair. Other things being equal, we believe that they should have been preferred. Then there could have been *no* argument!

Counsel for defendant were appointed by the court to defend the defendant in the trial court because of defendant's lack of means to hire attorneys for his defense. The defendant has managed by one way or another to pay counsel a meager fee for prosecuting this appeal. But it is only our faith in the justice of defendant's cause that has moved us to undertake it. The outcome of this appeal is fraught with much concern to the defendant. It means disgrace, or vindication and a new trial.

As officers of the court we do not hesitate to say that, had defendant's instructions been given, the defendant would in our opinion have been acquitted.

But one further specification of error need be considered. Referring to defendant's assignment of errors

IX [Transcript of Record, bottom of p. 61]. Although we know of no Federal statute providing for a special finding by the jury on a particular question, nevertheless, on the other hand, we know of no statute prohibiting such a practice. Such a finding is provided for by law in the state courts, not only in California but also in most of the states if not all of them, and we see no reason why defendant's request for a special finding should not have been permitted here.

The request for this special verdict was the final and concluding attempt of defendant's counsel to protect the defendant from the prejudicial effect of evidence which was admitted over objection. The jury, when faced squarely with the necessity of answering this question, would then have stopped to ponder about as follows: "Now if this man Anderson did actually take Rood onto the land and show it to him, telling him at the time that this was the land that he was going to file him on, and then Rood did actually file on the land, why, I do not see how any representations, whether true or false, as to the character of the soil or its productivity, could make any difference—Rood must have taken it with his eyes open, and if the land did not turn out to be what Rood wanted, I don't see that that is any reason for us to find Anderson guilty of misrepresenting the location of the land."

We believe the question would have materially aided the jury in analyzing its verdict.

The following is the opinion of former Chief Justice Beatty of the purpose and merit of the special

verdict (quoting from 152 Cal. 125, second paragraph on page 130 thereof):

"It is perhaps unnecessary under the circumstances to say that the ruling was based upon an evident misconception of the sole purpose of the then recent amendment to section 625 of the Code of Civil Procedure making the submission of special issues and particular questions of fact, when properly requested, compulsory in all cases tried by jury.

"It is of course true, but no truer today than it always has been, that a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense, and the very purpose of special findings is to test the validity of the general verdict by ascertaining whether or not it may have been the result of a misapplication of the law to actual findings in material conflict with the findings which in their absence would be implied from the general verdict. In other words, the response of the jury to the special issues or particular questions of fact may show that no judgment can properly be entered in favor of a plaintiff upon a general verdict because the jury had not found in his favor upon some material issue, or has found against him as to some fact fatal to his cause of action, and in case of a general verdict for a defendant the special findings, together with the facts admitted on the record, may show that the plaintiff is entitled to a judgment notwithstanding the general verdict against him. These are but illustrations of a great variety of cases,

frequently occurring, in which special findings would show that a general verdict is a verdict against law, upon which it would be the duty of the court either to enter no judgment at all because the findings were insufficient to support a judgment for either party, or because the party against whom the general verdict was returned would be entitled to a judgment *non obstante*. The Legislature, recognizing these conditions, and in view of the great and growing difficulty which jurors encounter in the effort to apply to facts—plain enough in themselves—the law given to them in the form of voluminous instructions abounding in nice distinctions, often imperfectly stated, and of doubtful meaning even to those who have had the advantage of professional training, has wisely determined that upon the proper request of either party to an action the court *must* direct the jury if they return a general verdict to give answers to any material question, or questions of fact, which will enable the court, in the exercise of its proper functions, to apply the law to the real facts of the case as they have been actually found, instead of recording a judgment wholly unsupported by the facts. It is not a question with the courts whether this law should be enforced, but some question seems to be made whether it should be liberally construed and applied, or narrowly construed, and hampered in its application on account of the inconveniences which it is supposed to involve. The most serious fault imputed to it is that its enforcement will often result in mistrials on account of the inability of

jurors to agree upon the facts necessary to support their general verdicts. This, so far from being a fault, is to my mind the crowning virtue of the amendment referred to, as it is its sole justification. Jurors are not supposed to be skilled in the interpretation of the law, and they may often make mistakes in applying it to a given state of facts, but the concurring judgment of twelve men as to the effect of conflicting evidence upon an issue of fact is accorded great weight and is generally conclusive. If in any case a jury is unable to find that a material fact has been proved, no man should be allowed to profit or be condemned to suffer by the implied existence of such fact, resulting from the return of a general verdict; and if a fact has been proved fatally at variance with their general verdict, no man should gain or lose by the necessity of inferring its non-existence in the absence of a specific finding. In either case the worst effect of the due operation of the amended statute would be the immediate and just award of a new trial, while the result of its non-enactment, or the failure to apply it, would be, at best, an order for a new trial, after a long and troublesome proceeding, and at the worst a cruel and irremediable injustice to the losing party consequent upon the refusal of a new trial. Between these alternatives it is difficult to suppose that any tribunal, legislative or judicial, could hesitate which to choose. I at least, speaking from long experience as a trial judge and member of courts of review, am firmly convinced that the amended law was wisely enacted, and that its operation, if liberally con-

> strued and freely applied, as all remedial statutes should be, especially in matters of procedure, will be to prevent many miscarriages of justice, at the same time that it will eliminate much of the trouble and delay hitherto experienced in disposing of motions for new trials based upon the ground that the verdict is against the evidence."

In the case at bar the general verdict of guilty upon the Rood count implied a finding in favor of the plaintiff of every fact essential to the support of the charge, and it was the purpose of defendant in requesting the special verdict to require an answer to a question which is answered favorably to the defendant would show that the jury, while it had not found against the defendant upon a separate element of the case, nevertheless had rendered a "lump" verdict against him which might conceal some mental reservations. Had the special verdict requested been answered by the jury in the affirmative, the general verdict of guilty could not have stood.

In the absence of any practice or statute relating to such a request to the jury for a special verdict upon the question submitted by the defendant, we believe that the language of Justice Taggart states the theory upon which the trial judge in the case at bar should have permitted defendant's request. Quoting from 12 Cal. App. 207, beginning on page 214 thereof:

> "We do not regard the analogy between a request for instructions and a request for the submission of special interrogatories so close as to

justify the application to the latter of a rule of practice adopted in connection with the former. Neither does the reason underlying the general rule of practice relating to the time for presenting instructions appear to us to apply with the same force to the matter of requesting special issues to be submitted. While we agree with respondent's position that this is a matter resting largely in the discretion of the trial judge where there is neither rule of practice nor statute relating to it, we are not prepared to say that under the circumstances of this case the trial judge was justified in refusing to submit these issues solely upon the ground that the request for submission was not made in time. It has been held that in the matter of presenting instructions for the jury where there is no rule in regard to the matter a party would have a right to submit his instructions at any time before the jury leaves the box. (People v. Williams, 32 Cal. 280, 286.) And even rules applying to such matters should be framed and applied in the furtherance of justice and not strictly adhered to where such adherence would work the opposite result (page 287).

"The special findings which the parties were entitled to have made by the jury under the provisions of section 625, Code of Civil Procedure, as that section read and was interpreted when this case was tried, were not the special verdict of the common-law practice which must be sufficient to support a judgment, but their primary purpose was to determine whether the general verdict was or was not against law. (Larsen v.

Leonardt, 8 Cal. App. 226, 228 (96 Pac. 395).) They were addressed to matters relevant to the essential issues impliedly found by the jury in reaching a general verdict, and were subject to two conditions:

"1. Is the question so framed as to admit of a plain and direct answer? and, 2. Would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?"

And for these reasons we ask that the judgment be reversed. If such should be the judgment of the Appellate Court we are thoroughly of the belief that an innocent man will be acquitted in a new trial of the issue.

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